BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Telephone Number Portability July 3, 2003 Letter from John Muleta, Chief, Wireless Telecommunications Bureau, to John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, and Michael T. Altschul, Senior Vice President, General Counsel, Cellular Telecommunications & Internet Association (DA 03-2190)	)	CC Docket No. 95-116

PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, APPLICATION FOR REVIEW

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To: The Commission

I. INTRODUCTION AND SUMMARY

Pursuant to Sections 1.2 and 1.115 of the Commission's rules,[1] ALLTEL Communications, Inc. ("ALLTEL"), AT&T Wireless Services, Inc. ("AWS"), Cingular Wireless LLC ("Cingular"), Nextel Communications, Inc., its subsidiaries and affiliates (collectively "Nextel") and Sprint Corporation, on behalf of its wireless division ("Sprint") (collectively, the "Wireless Carrier Group" or "Group") hereby submit this petition for declaratory ruling or, in the alternative, application for review of the captioned letter ("WTB Letter"). The WTB Letter provides guidance on several issues related to the implementation of wireless local number portability ("LNP"), including a statement that wireless carriers may not delay the porting of a number for any reason "unrelated to validating a customer's identity."[2]

[1] 47 C.F.R. §§ 1.2, 1.115.

[2] WTB Letter at 3.

Due to the new and novel issues the WTB Letter addresses and the dramatic impact that a directive on unconditional porting would have on carriers' operations and contracts, it does not appear that the Commission would treat the WTB Letter as having binding effect, nor, as explained below, could the Wireless Telecommunications Bureau ("WTB") have promulgated a binding rule in this manner. As a result, until further Commission ruling, the Wireless Carrier Group intends to treat the WTB Letter as no more than the guidance it was described to be.

However, because at least one wireless carrier has asserted that the WTB Letter has binding effect, the Wireless Carrier Group believes that the industry would benefit from clarification of the legal status of the WTB Letter and thus has made this filing. The Group requests that the Commission state in a ruling on this filing that the statement in the WTB Letter regarding unconditional porting is the non-binding guidance of the WTB.

In the alternative, the Wireless Carrier Group requests that the Commission review the WTB Letter and invalidate the statement in it regarding unconditional porting on the grounds that such action: (1) exceeded the authority delegated to the WTB Chief; (2) violated the Administrative Procedure Act;[3] (3) abrogated contracts without the requisite findings; and (4) created unsound public policy.

The Wireless Carrier Group asks that the Commission act by September 1, 2003.[4] The WTB Letter has created additional uncertainty regarding the wireless LNP implementation process and upset carriers' legitimate expectations, hindering efforts to finalize LNP

[3] Administrative Procedure Act, 5 U.S.C. §§ 500-596 ("APA").

[4] The Cellular Telecommunications and Internet Association ("CTIA") has requested that the Commission resolve all outstanding LNP implementation matters by this date. *CTIA Petition for Declaratory Ruling on Local Number Portability Issues* at 6, CC Dkt. 95-116 (filed May 13, 2003) ("*CTIA LNP Implementation Petition*").

implementation plans. The Group emphasizes that this filing does not seek to delay implementation of wireless LNP or otherwise question carriers' obligation to port telephone numbers upon reasonable request.

II. BACKGROUND

A. Market-Based Regulation of Wireless Carriers

It has long been the case that "as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.'"[5] Consistent with this preference, the Commission has granted wireless carriers a great deal of flexibility in setting their rates and terms of service. Carriers generally are free under the Communications Act to establish any rates and terms they believe will most attract and satisfy consumers and best ensure their success in the market, subject only to the reasonableness and non-discrimination mandates of Sections 201 and 202 of the Act.[6]

Reliance on market forces in the regulation of wireless carriers has resulted in significant benefits for consumers. Very recently the Commission reaffirmed in its *Eighth Annual CMRS Competition Report* that allowing the marketplace rather than regulation to govern wireless service has been a great competitive success, stating that "the CMRS industry [has] continued to

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[5] *In re Southwestern Bell Mobile Systems*, 14 FCC Rcd 19898 at ¶ 9 (1999) (citation omitted).

[6] 47 U.S.C. §§ 201, 202. *See In re Implementation of Sections 3(n) and 332 of the Communications Act Regarding Regulatory Treatment of Mobile Services*, GN Dkt. 93-252, Second Report and Order, 9 FCC Rcd. 1411, ¶¶ 173, 175 (1994). In forbearing from imposing tariff requirements on wireless carriers, the Commission observed that "in a competitive market, market forces generally are sufficient to ensure the lawfulness of … terms and conditions of service set by carriers who lack market power." *Id.* at ¶ 173. In fact, the Commission recently opined that the vigorous competition in the wireless market makes it unlikely that carriers would have the incentive to engage in unreasonable discrimination or unjust or unreasonable practices. *Orloff* v. *Vodafone AirTouch Licenses*, *LLC*, Memorandum Opinion and Order, 17 FCC Rcd 8987 at ¶¶ 20, 26 (2002).

experience increased service availability, lower prices for consumers, innovation, and a wider variety of service offerings."[7]

The diverse and innovative service offerings that wireless carriers have developed in response to consumer demand are carefully structured and contain many interdependent components. The offerings embody a delicate balance between what product and rate the carrier is willing to offer and what commitments and restrictions the customer is willing to accept in return. Consumers receive certain benefits, *e.g.*, a discounted telephone, lower rates or more total minutes, in exchange for certain trade-offs, *e.g.*, minimum contract term or peak/off-peak usage restrictions. Product offerings to businesses can be even more complicated, involving volume discounts and specialized marketing arrangements. Having allowed the market for wireless services to grow and flourish without the heavy hand of excessive regulation, the Commission cannot now withdraw select strands of this market freedom without disturbing the complex structure of wireless carriers' service offerings to the ultimate detriment of consumers and carriers alike.

B. Wireless LNP

The Commission has not acted on any of the wireless LNP proposals of the North American Numbering Council ("NANC") and therefore to date there are no wireless LNP rules. As the deadline for implementation of wireless LNP approaches, the wireless industry has urged the Commission to resolve a number of outstanding issues essential to effective LNP deployment. In January 2003, the CTIA filed a petition seeking a declaratory ruling on whether historic wireline rate center boundaries can be used by carriers to limit consumers' access to

[7] *Eighth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Dkt. 02-379 at ¶ 14 (rel. July 14, 2003) ("*Eighth Annual CMRS Competition Report*"). *See also id.* at ¶ 48 (finding a "high level of competition for mobile telephone customers").

wireless LNP ("*CTIA Rate Center Petition*").[8] CTIA filed the *CTIA LNP Implementation Petition* in May 2003 seeking clarification on several other wireless LNP issues which remain unresolved, including issues related to porting intervals (and the provision of E-911 services during such intervals) and whether wireless carriers should have to enter interconnection negotiations for number portability.[9]

In response to the *CTIA LNP Implementation Petition*, Verizon Wireless submitted a written *ex parte* in which it asked the Commission to state that a porting-out carrier may not impose restrictions on releasing the number other than those necessary for customer validation.[10] According to Verizon Wireless, this issue is a "sub-set" of the porting interval issue raised by CTIA.[11] In their comments on the CTIA petitions, certain parties addressed the "port conditioning" issue raised by Verizon Wireless.[12] The Commission has not yet issued a decision on either CTIA petition.

The WTB Letter recognizes that these proceedings remain pending and the issues unresolved.[13] The WTB Letter declines to address certain issues on the grounds that they are the subject of the pending CTIA petition proceedings, *e.g.* whether wireline carriers must port numbers to wireless carriers whose service areas overlap the wireline carriers' rate centers.[14] The WTB nevertheless proceeds to offer its guidance regarding certain other issues, including

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[8] *CTIA Petition for Declaratory Ruling*, CC Dkt. 95-116 (filed January 23, 2003).

[9] *CTIA LNP Implementation Petition*, *supra* n. 4.

[10] *Ex Parte* Letter of J. Scott (Verizon Wireless) to M. Dortch, FCC Secretary, CC Dkt. 95-116 (May 20, 2003).

[11] *Id.* at 2.

[12] *See, e.g.*, Cingular Comments on *CTIA LNP Implementation Petition* at 21-25 (June 13, 2003); Nextel Comments on *CTIA LNP Implementation Petition* at 7-10 (June 13, 2003); AWS Reply Comments on *CTIA LNP Implementation Petition* at 8-9 (June 24, 2003).

[13] WTB Letter at 4.

[14] *Id.*

carrier conditions on porting and the provision of E-911 during the porting interval.[15] The WTB Letter does not explain its disparate treatment of these issues.

III. ARGUMENT

A. The WTB Letter Is Non-Binding

It does not appear that the Commission would treat the WTB Letter as having binding effect. The WTB Letter was issued at the bureau level and its language suggests that it is merely advisory rather than prescriptive. Also, the WTB Letter addresses new and novel issues without addressing comment on those issues presented by parties in another proceeding before the Commission.

Moreover, as explained below, the impact of the guidance (were it to be binding) would be quite significant. It would abrogate carriers' contractual rights, upset the delicate balance of benefits and obligations in wireless service arrangements and harm rather than serve the public interest. As discussed above, wireless service offerings contain many interdependent components which reflect the bargain struck between carrier and customer. Carriers often subsidize handsets or offer other inducements to persuade prospective customers to subscribe. In exchange, carriers require contract provisions that allow them to recover customer acquisition investment. Such provisions take a variety of forms, including a minimum contract term, credit check or deposit requirement and a requirement that service shall be paid in full before additional service is provided. In addition, some contracts specifically require a customer to satisfy his or her outstanding obligations before the carrier ports his or her number.

Significantly, during the current termination process, the carrier has the opportunity to remind the departing customer of any such outstanding obligations. Such a reminder allows the customer to make an informed decision as to whether he or she would like to proceed with

[15] *Id.* at 2-3.

terminating service despite those existing obligations. Because many customers choose to fulfill their obligations, either by completing the minimum term or paying an early termination fee, carriers in most instances are able to recover some of their upfront investment in the customer without additional cost. This equilibrium would be upset under an unconditional porting regime in which the abandoned carrier has no opportunity to review with the departing customer any outstanding obligations and in fact must facilitate a breach of its own contract.

The Group respectfully submits that the Commission must act on an issue with such far reaching impact with more fulsome consideration. The Group therefore requests that the Commission clarify that the statement regarding unconditional porting constitutes the non-binding guidance of the WTB.

B. In the Alternative, the Commission Should Invalidate the Directive on Unconditional Porting

1. If Binding, the WTB Letter's Directive Would Exceed the WTB Chief's Delegated Authority

In order to conduct its business more efficiently, the Commission has delegated authority to its major staff units to act on certain matters. The scope of this delegated authority is delineated by rule and subject to significant restrictions. For example, Commission staff operating pursuant to delegated authority may act only on those matters which are "minor or routine or settled in nature."[16] The specific delegation of authority to the WTB Chief expressly provides as follows:

> The Chief, Wireless Telecommunications Bureau, shall not have authority to act on any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or

[16] 47 C.F.R. § 0.5(c).

> policy which cannot be resolved under outstanding Commission precedents and guidelines."[17]

The delegation further provides that the Chief does not have authority to act independently in a rulemaking capacity.[18] The specific delegations to other bureau chiefs and staff are subject to virtually identical restrictions.[19]

Pursuant to their delegated authority, bureau chiefs are permitted, in certain instances, to interpret or clarify existing rules consistent with existing precedent and policy. Critically, however, the bureau chiefs expressly are prohibited from modifying existing rules or promulgating new rules. The Commission itself has determined that the authority delegated to bureau chiefs and their staff is limited. For example, the Commission vacated a directive set forth in a responsible accounting officer ("RAO") letter issued by the former Common Carrier Bureau ("CCB") ("*RAO 20 Letter*") because it went beyond existing accounting rules and therefore exceeded the CCB's delegated authority.[20]

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[17] *Id.* at § 0.331(a)(2) (emphasis added).

[18] *Id*. at § 0.331(d).

[19] *See, e.g.*, 47 C.F.R. § 0.261(b) (Chief of the International Bureau cannot act on matters presenting "new or novel" arguments not capable of resolution under existing Commission precedent). For example, the Commission authorized the Chief of the former Mass Media Bureau to rule on requests for waiver of the television-newspaper cross-ownership rule "that are clearly consistent with Commission precedent, *i.e.*, which present no new or novel issues." *Application of WHOA-TV for Assignment of Television Station License,* Memorandum Opinion and Order, 11 FCC Rcd 20041at ¶ 19 (1996).

[20] *In re Responsible Accounting Office Letter 20*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Dkt. 96-22, 11 FCC Rcd 2957 (1996), *pet'n for recon. denied*, 12 FCC Rcd 2321 (1997). This case involved Sections 65.820 and 65.830 of the Commission's rules, which expressly enumerated those items to be included in the interstate rate base. In the *RAO 20 Letter*, the CCB instructed carriers to exclude certain postretirement benefits from the interstate rate base in addition to the specific exclusions already provided for in the rules. The Commission vacated the letter because it went beyond mere "explanation" and "interpretation" of existing rules and "exceeded [CCB's] delegated authority to the extent that it directed exclusions from the additions to rate base for which the Part 65 rules do not specifically provide." *Id.* at ¶ 25.

a. If Binding, the WTB Letter Impermissibly Would Create a New Substantive Rule

If binding, the WTB Chief's guidance would establish a new requirement, that wireless carriers port a number anytime they receive a verified porting request, in an area in which the Commission has issued no detailed rules.

The WTB Letter looks for support by seeking to associate its guidance with existing Commission rules. This effort is unavailing; the specific guidance provided cannot fairly be characterized as an "interpretation" of existing law. For instance, to support the statement that carriers may not impose restrictions on the porting-out process beyond customer validation, the WTB Letter cites to the Commission's rules stating generally that carriers must provide LNP.[21] However, these general LNP regulations do not confer on a carrier an absolute right to port in a number or on customers an absolute right to port their numbers. Such an interpretation not only would be too broad and over-reaching, it would conflict with other Commission precedent allowing certain conditions on porting.

Under current rules, for example, a carrier is not required to port a disconnected number,[22] a 500 or a 900 number[23] or an 800 number on which a balance is owed.[24] Moreover,

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[21] WTB Letter at 3, n. 17 (citing 47 C.F.R. §§ 52.23, 52.31).

[22] Numbers that have been "disconnected" are no longer working in the PSTN and are not "assigned" and are not required to be ported. *See In re Numbering Resource Optimization,* CC Dkt. 99-200, Report and Order and Further Notice of Proposed Rulemaking at ¶¶ 230-231 (2000) (declining to require carriers to port unassigned numbers).

[23] Although the Commission has directed the Industry Numbering Committee to examine the technical feasibility of porting 500 and 900 numbers, NANC has recommended that the Commission suspend consideration of this issue due to a lack of demand for such a capability. *See* Public Notice, *Common Carrier Bureau Seeks Comment on North American Numbering Council Recommendation Concerning Feasibility of Number Portability of 500 and 900 Numbers*, DA 99-1527, CC Dkt. 95-116 (Aug. 3, 1999).

[24] The Commission has determined that 800 numbers involved in billing disputes are eligible for suspended status, which means those numbers are temporarily disconnected. *In re Toll Free Service Access Codes,* CC Dkt. 95-155, Second Report and Order and Further Notice

while not now the subject of a Commission rule or industry guideline, one can easily imagine a number of other instances where carriers might have an affirmative duty to deny a porting request, *e.g.*, in cases of suspected fraud or violation of law.

Moreover, the fact that a law or regulation imposes a general obligation does not mean that carriers cannot impose reasonable conditions on such an obligation. For example, a common carrier's general obligation to serve under Section 201 of the Act[25] does not prevent it from imposing reasonable pre-conditions on service including requiring a demonstration of good credit or payment of past due amounts before initiating service.[26] Also, carriers can refuse to provide service where it is technically not possible or where providing service would be contrary to Commission rules.[27] Similarly, the general porting obligation set forth in the rules does not create any absolute right to port a number.

The WTB Letter also cites the Commission's definition of LNP as support for its directive on "port conditioning."[28] The WTB Letter argues that this definition "contemplates" an environment where it is "as easy for consumers to switch carriers and port their existing telephone number as it is for consumers to switch carriers without taking their existing number

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of Proposed Rulemaking, 12 FCC Rcd 11162 at ¶ 55 (1997). To the extent the number is disconnected, it no longer is available in the toll-free database and cannot be ported.

[25] 47 U.S.C. § 201 ("It shall be the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request therefor. . . .").

[26] *See, e.g., In re Dial Info, Inc., v. AT&T Corp.*, File No. E-86-6, 1986 FCC LEXIS 2640 (rel. September 29, 1986).

[27] *See In re GE Capital Communications Services Corp., v. AT&T Corp.,* 13 FCC Rcd. 13138 (1998); *In re Net2000 Communications, Inc. v. Verizon – Washington, D.C.*, 17 FCC Rcd. 1150 (2002).

[28] The definition of LNP is "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience, when switching from one telecommunications carrier to another." 47 C.F.R. § 52.21(k).

with them."[29] The WTB Letter then presents the flawed argument that its directive on unconditional porting is necessary to achieve that end.

Notwithstanding the WTB Letter's characterization, there is nothing in the definition of LNP that could be interpreted to mean that the goal or "contemplation" of the Commission's LNP mandate is as described in the WTB Letter. Moreover, implementation of the WTB Letter's directive would not result in the suggested parity between the ability of a customer to switch carriers in a pre- and post-porting environment. Rather, the impact of the directive would be that in the post-porting world (1) carriers would be forced to provide an additional service (porting) to non-paying customers; (2) carriers would be forced to facilitate breach of the contract; and (3) customers will switch service without notice of potential outstanding contract obligations and without the ability to make informed decisions on porting the number.

b. If Binding, the WTB Letter Would Resolve in Isolation an Issue that Has Been the Subject of Comment in Another Proceeding

An attempt to mandate unconditional porting in this manner would be particularly inappropriate given that the issue of permissible porting restrictions has been raised in the pending proceeding on the *CTIA LNP Implementation Petition*. It would be improper for the WTB to seek to exercise delegated authority on a matter that parties have commented on in an ongoing proceeding before the Commission. The Commission has ruled that such action is procedurally defective.

In the *Arundel Trunked Partnership* decision, for instance, the Commission determined that it was improper for the WTB to act on a request to waive a Commission rule to permit relocation of a base station when the Commission already was considering in a pending

[29] WTB Letter at 3.

proceeding whether to allow such relocations as a general matter.[30] The Commission ruled that the WTB's Land Mobile Branch simply "should not have acted upon the Petitioners' requests for waiver until such time as the Commission decided the issue raised by the . . . Petition on reconsideration."[31] In the present case, the WTB Letter, more specifically the statement on unconditional porting, is equally unenforceable because the very same issue has been raised in the on-going proceeding on the *CTIA LNP Implementation Petition*.

The *CTIA LNP Implementation Petition* and the comments on the petition present numerous legal and policy arguments regarding the rights of carriers to condition porting under certain specified circumstances. Indeed, many commenting parties argued that a provision such as that set forth in the WTB Letter, *i.e.*, one that prohibits carriers from imposing even reasonable business-related conditions on porting, would be contrary to law and unwise public policy.[32] However, the WTB Letter does not reference or respond to any of these arguments. If binding, the guidance thus would resolve the issue of permissible conditions on porting in isolation without any apparent consideration of the record developed in that proceeding.

2. If Binding, the WTB Letter Would Violate the Rulemaking Requirements of the APA

If binding, the WTB Letter would establish a new substantive rule of general applicability on an issue not addressed in the Commission's existing regulations. The Commission would be required to promulgate such a rule through a formal rulemaking as required under the APA. To "assure fairness and mature consideration of rules of general application," the APA requires

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[30] *In re Application for Review of Arundel Trunked Partnership*, 15 FCC Rcd 5288 (2000) (reversing the denial of a waiver request by the Land Mobile Branch of the Commercial Wireless Division and granting the requested waiver).

[31] *Id.* at ¶ 9.

[32] *See, e.g.*, Nextel Comments on *CTIA LNP Implementation Petition* at 7-10 (June 13, 2003); AWS Reply Comments on *CTIA LNP Implementation Petition* at 8-9 (June 24, 2003).

agencies to promulgate substantive rules through notice and comment rulemaking in compliance with the requirements of Section 553 of the APA.[33] To countenance such action by letter ruling would violate the APA and deny carriers procedural due process.[34]

Under Section 553, an agency must conduct a formal notice and comment rulemaking anytime it seeks to promulgate a "substantive" rule.[35] Substantive rules "grant rights, impose obligations, or produce other significant effects on private interests."[36] A substantive rule establishes a "binding norm" and does not "leave the agency and its decisionmakers free to exercise discretion."[37]

"Interpretive" rules, in contrast, are non-binding agency statements that provide "clarification of statutory language" or "remind affected parties of existing duties."[38] An agency need not conduct a rulemaking in order to promulgate interpretive rules. However, courts will scrutinize closely action characterized by an agency as interpretive and invalidate the action if in fact it is disguised substantive rulemaking conducted outside of APA procedures. For example, in *National Treasury Employees Union v. Ronald Reagan*, the court invalidated provisions set forth by the Office of Personnel Management ("OPM") in a Federal Personnel Manual ("FPM") letter to federal agencies.[39] The FPM letter instructed agencies on the implementation of an Executive Order regarding workplace drug testing. The court held that the "mandatory

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[33] *Nat'l Labor Relations Bd. v. Wyman-Gordon Company*, 394 U.S. 759, 764 (1969).

[34] The Group states no opinion as to whether resolution of this issue in the proceeding on the *CTIA LNP Implementation Petition* would comport with APA requirements.

[35] 47 U.S.C. 553(b); *Chamber of Commerce of the United States v. Occupational Safety and Health Administration*, 636 F.2d 464, 470 (D.C. Cir. 1980).

[36] *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980).

[37] *Chamber of Commerce*, 636 F.2d at 467 (citation omitted).

[38] *Id.* at 469 (citation omitted).

[39] *Nat'l Treasury Employees Union v. Ronald Reagan*, 685 F.Supp. 1346 (E.D. La. 1988).

instructions" in the letter imposed new obligations not contained in the Executive Order and therefore the letter constituted a substantive rule. The court observed that "the fact that the issuance is contained in the FPM [letter], do[es] not establish the FPM letter as a non-binding agency statement which is beyond the scope of the APA requirements of publication for notice and comment" rather "[i]t is the effect of the rule that is most relevant."[40] Because OPM included the provisions in a letter and did not adhere to the APA's rulemaking requirements, the court invalidated the FPM letter.[41]

In this case, the WTB Letter states that "carriers may not impose restrictions on the porting-out process beyond necessary customer validation requirements."[42] The letter concludes by stating that the Commission "expect[s] carriers to fully comply with the LNP requirements,"[43] which implicitly includes the directive set forth in the letter itself. If the Commission intends the foregoing language to impose a binding obligation upon carriers, the WTB Letter would result in the creation of a substantive rule, imposing an obligation on wireless carriers that would impact their interests adversely. Because there is no existing rule on this issue, it could not be argued that such a rule simply would "interpret" existing provisions or describe "an existing duty."

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[40] *Id.* at 1356.

[41] *Id.* at 1357. Similarly, in *Chamber of Commerce*, the court invalidated a provision promulgated by the Assistant Secretary of the Occupational Health and Safety Administration ("OSHA") that would have required employers to compensate an employee representative that accompanies an inspector during an inspection of the employee's workplace. The court held that the provision constituted a substantive rule because it imposed a new obligation on employers beyond existing law. The court ruled that because the Fair Labor Standards Act "neither prohibits nor compels pay for walkaround time . . .[t]here was no 'existing duty' to serve as the subject of an [OSHA] reminder." 636 F.2d at 469. The court then vacated the rule because OSHA adopted it without conducting the rulemaking required by the APA, cautioning the Assistant Secretary not to "treat the procedural obligations under the APA as meaningless ritual." *Id.* at 470.

[42] WTB Letter at 3 (emphasis added).

[43] *Id.* at 4.

Prior to the WTB Letter, there was no such prohibition on a carrier's right to impose conditions on the porting process.

If binding, the WTB Letter would impose entirely new obligations on affected parties and therefore would constitute a substantive rule. However, there was no public notice of a proposed rule as required under the APA describing "the range of alternatives being considered with reasonable specificity"[44] nor did parties have any opportunity to offer comment.[45] Because the Commission did not promulgate the directive through a formal rulemaking, the WTB Letter would be invalid as a substantive rule.[46]

3. The WTB's Guidance Is Devoid of Record Evidence and, if Binding, Would Unlawfully Abrogate Valid Carrier Contracts without the Requisite Public Interest Findings

If binding, the WTB Letter would have far reaching impacts on existing customer contracts. However, absent notice and comment rulemaking and a valid public interest determination, the Commission may not interfere with carriers' enforcement of lawful and reasonable contracts with their customers. Specifically, a Commission decision to abrogate carriers' contractual rights "must follow investigation and a determination that the contract was

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[44] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

[45] 47 U.S.C. § 553(b).

[46] Moreover, due process "guarantees that parties who will be affected by [a] general rule be given an opportunity to challenge the agency's action" either in the rulemaking context or through individual adjudications. *Florida Gas Transmission Co. v. Federal Energy Regulatory Commission*, 876 F.2d 42, 44 (5th Cir. 1989). Although the Constitution does not require greater notice and comment protections than those set forth in Section 553, it does at a minimum require that an agency adhere to those procedures. *Cf. Hawaii Helicopter Operators Assoc. v. Federal Aviation Administration*, 51 F.3d 212, 215 (9th Cir. 1995) (holding that issuance of rule without notice and comment did not violate due process because failure to do so was justified for public safety reasons under Section 553's "good cause" exception). If the letter establishes a substantive rule, the failure to comply with the essential rulemaking requirements of the APA would violate basic notions of procedural due process.

unjust, unreasonable, unduly discriminatory, or preferential."[47] The WTB Letter not only fails to make such a public interest showing, it fails to consider any record evidence that has been presented on this issue. Bureau guidance that did not invite and does not consider contrary arguments with respect to the ramifications of upsetting a carrier-customer contract cannot stand without Commission review.

As Cingular pointed out in its comments on the *CTIA LNP Implementation Petition*, it is generally beyond the Commission's power to abrogate terms in carriers' contracts.[48] This is particularly true where, as here, Congress has not authorized or directed the Commission to do so.[49] In *MCI*, the Commission argued that its action abrogating a contract "would protect the public interest by ensuring that all users of Bell's services are treated equitably, and would ensure that the Agreement does not excessively burden other consumers," a rationale quite similar to that pressed by Verizon Wireless and apparently adopted uncritically in the WTB Letter. However, the court vacated the Commission's decision, finding it had not made the requisite public interest findings prior to abrogating carriers' agreements.[50] The court explained:

> The Supreme Court has recognized the authority of a regulatory agency to modify contracts that might "cast upon other consumers an excessive burden," *but has required that contract modification*

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[47] *MCI v. FCC*, 665 F.2d 1300, 1303 (D.C.Cir. 1981) (*citing FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956) ("*Sierra*"). *See also United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*").

[48] *See* Cingular Comments on *CTIA LNP Implementation Petition* at 22 (June 13, 2003) (*citing Regents* v. *Carroll*, 338 U.S. 586, 602 (1950)).

[49] *Id. See also CTIA* v. *FCC*, No. 02-1264, slip op. at 5-6 (D.C. Cir. June 6, 2003) (wireless LNP not required by statute); *Bell Tel. Co. of Pa.* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[50] *MCI*, 665 F.2d at 1303. *See also id.* at 1302 ("Whatever may be said of statutes granting regulatory agencies authority to make changes in contracts via the prescription power, the Communications Act of 1934 grants the FCC no authority to authorize unilateral changes in agreements.").

> *must follow investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory, or preferential*.[51]

In *Western Union v. FCC*, which the Commission frequently cites as precedent when it takes an action that abrogates or modifies contract provisions,[52] the court similarly held that the Commission had not met its burden under the *Sierra-Mobile* doctrine prior to abrogating the agreement at issue.[53] The court held:

> The Commission made no finding that the requirements . . . were detrimental to the public interest. [T]he Commission never offered adequate reasons for jettisoning the provisions. In its very general treatment of the settlement agreement, the Commission did not reweigh in any detail the tradeoff made in these provisions between expedition and care. Thus, we do not think the Commission justified abrogating the settlement agreement.[54]

In the present case, the guidance issued by the WTB clearly would interfere with carriers' existing contractual provisions, including those that establish minimum contract terms, early termination fees and credit requirements. As discussed above, so long as carriers maintain the option of delaying the port until the customer satisfies any outstanding financial obligations, the foregoing contract provisions allow carriers a reasonable opportunity to recover their investment in the customer. Moreover, delay of the port in such circumstances reminds the customer of the outstanding obligations and allows her to make an informed decision as to whether she would like to proceed with the port. The WTB Letter would abrogate this customer-friendly equilibrium and effectively prevent carriers from recovering their full customer investment. However, the Commission has not undertaken any investigation required by *MCI* much less made any finding that a policy of denying ports until the customer satisfies his or her contractual

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[51] *Id.* at 1303 (quoting *Sierra*) (emphasis added).

[52] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order, WT Dkt. 99-217, 15 FCC Rcd 22983 at ¶ 36 (2000).

[53] *Western Union*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

obligations would be unjust or unreasonable. In short, the Bureau's guidance falls short of meeting the legal standard for contract modifications enunciated by the Supreme Court in *Sierra* and *Mobile* and as applied to Commission actions in *MCI* and *Western Union*.

The unlawfulness of a directive that would exalt an absolute right to port over the bargained-for contract is even more egregious where a service agreement explicitly provides that the carrier is not obligated to port a number if the customer's account is not paid in full.[55] Such a provision is a wholly fair and elemental part of the carrier-customer bargain described above, and the provider of the service need not perform a new service (here, the final one) if the beneficiary has not paid for the services already rendered.[56] Carriers clearly have the right to include such bargained-for provisions in their service agreements and the WTB may not unilaterally abrogate those provisions.

4. If Binding, the WTB Letter's Directive on Unconditional Porting Is Unsound Public Policy

In addition to invalidating the WTB Letter on procedural grounds, the Commission should reject its guidance on public policy grounds. As discussed below, the directive on unconditional porting, if binding, would force carriers to facilitate breach of contracts and impede their ability to offer many benefits valued by wireless consumers.

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[54] *Id*. at 1501-02 (footnotes omitted).

[55] *See* Cingular Comments on *CTIA LNP Implementation Petition* at 21 (June 13, 2003).

[56] Additionally, any conclusion by the Commission that porting is some form of "inalienable right" does not preclude carriers and customers from agreeing to condition that "right" on the obligation to pay for the service. *See Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp*., 865 F. Supp. 2 (D.D.C. 1994) (finding that parties may contract away even their First Amendment right to free speech) (*citing Snepp v. United States*, 444 U.S. 507 (1980)).

a. Adherence to the WTB's Guidance Would Sanction Contract Breaches and Require Wireless Carriers to Facilitate Such Breaches

Today all carriers require their customers to pay for services provided, to make those payments within a reasonable time, and, in many cases, to agree to a minimum contract term in exchange for certain service and equipment benefits (*e.g.,* a lower rate, more minutes, free night and weekend minutes, a subsidized handset). It is true that today a wireless customer can choose to breach his or her contractual commitments and change carriers despite arrearages, unfulfilled minimum contract terms or unpaid early termination fees. Significantly, however, no action by the Commission or its staff to date has sanctioned or condoned such behavior. The WTB Letter would change that dynamic by not only implicitly condoning such bad acts but also by requiring wireless carriers to actively facilitate and indeed effectuate contract violations.

Currently, the abandoned carrier has an opportunity to communicate with the customer prior to the change although it is not required to take any action to allow or facilitate the transfer of service. Under the Commission's new wireless number portability regime, the abandoned carrier must play an active role in the process by affirmatively "porting out" the customer's wireless number to the new carrier and incurring the related administrative costs and burden of effectuating the port. In the case of a porting request for a customer who owes the abandoned carrier past due amounts or has not satisfied a minimum contract term or similar obligation, the WTB Letter's guidance now would require the carrier to undertake these actions and actually facilitate a violation of its contractual bargain with the customer. Significantly, the carrier would have to take this action without even having the opportunity to inquire if the customer understands he or she is about to breach the contract and incur an obligation such as an early termination fee and to give the customer the opportunity to make an informed porting decision. While it is true that parties to a contract often must seek recourse after the contract has been

breached, it would be unprecedented for a government agency official, under these circumstances, to compel a carrier to facilitate a breach of its contract and to forego the rights and benefits of its bargain.

b. The WTB's Guidance Ignores the Interdependence of Wireless Service Agreements and Would Harm All Customers, Including Those Who Honor Their Contracts and Pay Their Debts

The WTB Letter fails to recognize the interdependence of the components of wireless service agreements described above. The combination of wireless LNP and the WTB's guidance on port conditioning would have severe impacts on the ability of carriers to maintain a host of benefits now enjoyed by wireless customers, including discounted rates, free minutes and subsidized handsets. Under this regime, carriers' bad debt would increase and carriers' ability to recover their substantial up-front investments in customer acquisition would be made more difficult.[57]

The economic ramifications of such a situation for wireless carriers are obvious and the resulting adverse impact on customers, inevitable. Although it is difficult to predict with certainty *how* the increased costs will be passed through to the consumer, in a competitive marketplace costs ultimately *will be* passed through to customers in some manner, *e.g.*, through increased rates, decreased capital investment and/or reduction in customer benefits.[58] One

[57] Wireless customer acquisition is reported to be $250-400 per customer, of which $100 or more may be attributable to handset subsidies. *See* "Cellphone Contracts Growing, *Sacramento Bee*, July 7, 2003 at D1; "Carriers Stuck with Handset Subsidies," *RCR Wireless News*, Mar. 31, 2003 at 1.

[58] *See* Debra J. Aron, *The Financial and Public Policy Implications of Key Proposed Telecommunications Consumer Protection Rules on California Wireless Carriers and Customers*, Presented at Regulating Wireless in California: Bill of Rights…Or Wrongs, Pacific Research Institute, April 15, 2003, p. 10 ("In a highly competitive market in which the overall economic profit margins are continually being driven towards zero, firms faced with a cost increase have only the option of eventually leaving the market, or passing the cost increases on to consumers."). Available at http://www.pacificresearch.org/events/2003/wireless/

potential casualty is the generous handset subsidies that carriers routinely provide customers today, and that customers have strongly supported.

Such an undesirable scenario is not speculative. In Australia, where wireless number portability was implemented in September 2001, carriers responded by promptly phasing out their handset subsidies.[59] The reason for such an industry response is self-evident. Handset subsidies and other "up-front" incentives are only economic when there is some ability over time to recoup the cost through payments for service or, as a fall-back, through an early termination fee. The Commission must not unwittingly cause the elimination of such consumer-friendly features without a full and reasoned analysis of the public interest considerations.

IV. CONCLUSION

In its most recent wireless LNP order, the Commission asserted its strong conviction that wireless number portability will promote competition to the benefit of customers.[60] It would be ironic, as well as destructive public policy, if the very benefits of portability proclaimed by the Commission were undermined or defeated by an ill-considered WTB policy that handcuffs carriers in their efforts to provide these competitive benefits.

For the reasons discussed above, the Wireless Carrier Group respectfully requests the following alternative forms of relief: (1) clarification in a formal ruling on this filing that the WTB Letter is non-binding and does not restrict the ability of carriers to impose reasonable,

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AronPaper.pdf. *See also* T. Randolph Beard, George S. Ford, R. Carter Hill, and Richard Saba, "The Flow Through of Cost Changes in Competitive Telecommunications: Theory and Evidence" (econometric study which finds relatively strong support for the flow-through of access charge reductions to consumer prices for AT&T and MCI). Available at http://www.telepolicy.com/ bootflow.pdf.

[59] *See* "Telstra Doesn't Intend to Subsidise Mobile Phone Developments," *AAP Newsfeed*, Oct. 23, 2001; "Talking Cheap," *Australian Financial Review*, Feb. 2, 2002 at 29.

[60] *Verizon Wireless Petition for Partial Forbearance*, Memorandum Opinion and Order, 17 FCC Rcd 14972 at ¶¶ 28-29 (2002).

business-related conditions on porting; or (2) nullification of the WTB Letter on the grounds set forth above.

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